Supreme Court, U.S.
FILED
APR 27 1988
JOSEPH F. SPANIOL
CLERK

No. 87-1425

In the Supreme Court of the United States

OCTOBER TERM, 1987

LARRY E. BAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

	Page
Cases:	
Mathews v. *United States*, No. 86-6109 (Feb. 24, 1988) ...	3, 4
Moore v. *Illinois*, 434 U.S. 220 (1977)	3
Constitution and statutes:	
U.S. Const.:	
Amend. V	2
Amend. VI	1, 3, 4
18 U.S.C. 1503	1

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1425

LARRY E. BAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that he was improperly denied an entrapment instruction at trial, that his Sixth Amendment rights were infringed, and that the trial judge constructively amended the indictment at trial.

1. After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on two counts of obstructing justice, in violation of 18 U.S.C. 1503. He was sentenced to five years' probation and fined $10,000. The court of appeals affirmed (Pet. App. 22-40).

The evidence at trial showed that a grand jury sitting in the Eastern District of Pennsylvania was investigating charges that, during the first half of 1986, a firm named Coastal Industries arranged a $22,000 payment to T.H. Apparels, Inc., to get the latter company to withdraw its low bid on a government contract for which the two firms were competing. Pursuant to the scheme, B.G. Colton, an officer of a third firm, H. Landau and Co., sent Coastal a

false invoice for a nonexistent shipment of cloth. In return, Coastal sent Colton a check made out to the fictitious "B.G. Mills." Colton then deposited that check in his personal bank account. Over a period of several months, Colton distributed most of that money to representatives of T.H. Apparels, and kept a portion of it for himself. Coastal eventually was awarded part of the government contract, receiving total payments of more than $2.5 million. Pet. App. 23-24.

In April 1986, FBI agents investigating the scheme contacted petitioner, who was associated with Coastal. After receiving *Miranda* warnings, petitioner refused to answer questions and informed the agents that he was represented by counsel. In October 1986, petitioner was served with a subpoena ordering him to appear before the grand jury. Prior to petitioner's appearance, his lawyer informed the government that petitioner would refuse to answer questions. Petitioner thereafter appeared before the grand jury, was advised that he was a "subject" but not a "target" of the investigation, and invoked his Fifth Amendment privilege. Pet. App. 23-24.

By January 1987, Emanuel Landau, the president of H. Landau and Co., had secretly agreed to cooperate with the government in its investigation. On January 7, 1987, petitioner's wife called Landau and asked him to place a telephone call to petitioner using a "clean" telephone. After first contacting his lawyer and the FBI, Landau called petitioner and recorded the conversation. He then turned the tape over to the FBI. The FBI later instructed Landau to make further telephone calls to petitioner and to record the conversations. During those conversations, petitioner attempted to get Landau's aid in persuading Colton to cover up the payoff scheme. Pet. App. 24.

On appeal, petitioner contended, among other things, that the district court erroneously refused to instruct the

jury on the defense of entrapment because petitioner had denied the mens rea element of the offense; that Landau's telephone conversations with him violated his Sixth Amendment right to counsel; and that the indictment was impermissibly amended when the district court requested a special verdict from the jury.[1]

The court of appeals affirmed the conviction (Pet. App. 22-40). Citing circuit precedent, it held that petitioner was not entitled to an entrapment instruction because he "would not admit to all elements of the charged offense" (*id.* at 33). Relying on *Moore* v. *Illinois*, 434 U.S. 220 (1977), the court of appeals also rejected petitioner's Sixth Amendment claim, finding that the right to counsel had not attached at the time of petitioner's conversations with Landau because petitioner had not yet "been subjected to an adversarial judicial criminal proceeding" (Pet. App. 27). And the court concluded that the district judge's use of a special verdict did not constructively amend the indictment (*id.* at 32-33).

2. Petitioner contends that the district court erred by refusing to charge the jury on entrapment. In *Mathews* v. *United States*, No. 86-6109 (Feb. 24, 1988), slip op. 4, this Court held that "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." In contrast, the court of appeals held that petitioner's denial of one of the

---

[1] The third count of the indictment alleged that petitioner had made two separate statements seeking assistance in covering up the payoff scheme. After deliberations began, the jurors sent the judge a note asking whether they had to find that petitioner had made both statements in order to return a conviction on Count 3. The court responded by telling the jury to consider petitioner's guilt separately as to each of the statements. The jury found petitioner guilty of making the first, but not the second, statement. Pet. App. 25-26.

elements of the charged offense made an entrapment instruction inappropriate. That holding cannot be squared with *Mathews*.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for reconsideration in light of *Mathews* v. *United States*, *supra*.[3]

CHARLES FRIED
Solicitor General

APRIL 1988

---

[2] Neither court below made findings on whether there was sufficient evidence of entrapment to justify submitting the issue to the jury. That question is one that the court of appeals should address in the first instance.

[3] Petitioner's other contentions do not warrant review. While petitioner renews his Sixth Amendment claim (Pet. 8-13), the court of appeals correctly explained (Pet. App. 26-29) that nothing occurring prior to petitioner's conversations with Landau triggered the attachment of petitioner's right to counsel; in none of the cases relied upon by petitioner (Pet. 9) did a court find that the Sixth Amendment right had attached prior to the time the government decided to prosecute. That decision plainly had not been made prior to petitioner's conversations with Landau, since those conversations formed the basis for the indictment (see Pet. App. 24). The court of appeals also correctly held that the district judge's request for special findings on the third count did not amend the indictment, since the request neither broadened nor narrowed the charges (*id.* at 32-33). There is no need for the Court to review this essentially factual conclusion.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60413